Supreme Court, U.S.
FILED
FEB 12 1999
CLERK

No. 98-874

In The

Supreme Court of the United States

October Term, 1998

ISKCON MIAMI, INC., A FLORIDA NONPROFIT, RELIGIOUS CORPORATION, AND VERNE MEIS, AN INDIVIDUAL,

Petitioners,

v.

METROPOLITAN DADE COUNTY, FLORIDA, AND GARY DELLAPA, AVIATION DIRECTOR OF MIAMI INTERNATIONAL AIRPORT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

DAVID M. LIBERMAN
Counsel of Record
DEBORAH ZEXTER
1888 Century Park East, Suite 1750
Los Angeles, California 90067
(310) 277-9288

HEYWARD A. BRADMAN
757 Northwest 27th Avenue
Third Floor
Miami, Florida 33125
(305) 643-3100

Attorneys for Petitioners ISKCON of Miami, Inc. and Verne Meis

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1399

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. MIA IS A PUBLIC FORUM 2

II. AIRPORTS NATIONWIDE SHARE MIA'S PUBLIC FORUM FEATURES 7

III. THE PUBLIC FORUM ANALYSIS APPLIED TO AIRPORT TERMINALS HAS LED TO SEVERE CONSEQUENCES IN OTHER FORA..... 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Airline Pilots Ass'n, Int'l v. Department of Aviation, 45 F.3d 1144 (7th Cir. 1995) 2

Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) 7

Chicago ACORN v. Metropolitan Pier & Exposition Authority, 150 F.3d 695 (7th Cir. 1998) 9, 10

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 (1985) 2

International Soc'y for Krishna Consciousness v. Griffin, 437 F.Supp. 666 (W.D. Pa. 1977) 5

International Society for Krishna Consciousness v. City of Los Angeles, 966 F.Supp. 956 (C.D. Cal. 1997) 6, 7

International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992) 1, 5, 7, 9, 10

Multimedia Publ'g Co. v. Greenville-Spartanburg Airport, 991 F.2d 154 (4th Cir. 1993) 3

United States v. Kokinda, 497 U.S. 720 (1990) 1

OTHER AUTHORITIES

Airports: Orlando International, Frequent Flyer, Feb. 1999, at 38, 38 4

Harriet Baskas, *A Capital New Terminal*, (visited Jan. 5, 1999) <http://abcnews.go.com/sections/travel/Stuck/airport_washnational.html> 8

Laurie McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B1 8

TABLE OF AUTHORITIES – Continued

Page

Herbert Muschamp, *Concerned More About People Than Planes*, N.Y. Times, July 6, 1997, § 2, at 30 7

Herbert Muschamp, *In Form and Function, It's a Tale of Two Terminals*, N.Y. Times, July 28, 1997, at A7 7

Richard Rayner, *Nowhere, U.S.A.*, N.Y. Times, Mar. 8, 1998, § 6 (Magazine), at 42, 46 9

Barbara Shea, *Retailers Invade Airports*, Raleigh News & Observer, Nov. 24, 1996, at H7, *available in* 1996 WL 14234234 4

Jennifer Steinhauer, *It's a Mall . . . It's an Airport . . . It's Both: The Latest Trend in Terminals*, N.Y. Times, June 10, 1998, at C1, C1 8

INTRODUCTION

Respondents' defense of Metropolitan Dade County, Fla. Code § 25-2.2(a) (1995) (hereinafter section 25-2.2) is neither fair nor logical. The commercialization of airport terminals is far more than a "striking trend" or passing fancy. Indeed, the commercial facilities found in modern airport terminals not only mirror those found in the greater community, but in many instances have supplanted them as well.

"If our public forum jurisprudence is to retain [its] vitality," *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring in the judgment), the commercial portions of airport terminals must be included within the public forum family. In the alternative, even if considered to be a nonpublic forum, the "objective characteristics" and "customary use by the public", *id.*, of modern airport terminals are so similar to traditional public fora, that regulations which ban the sale of religious literature are patently unreasonable.

Respondents circumvent this issue by minimizing the dominant public forum features that characterize Miami International Airport (MIA), as well as the monumental changes that have occurred nationwide in airports since the Court's decision in *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992). Respondents also seek to prejudice a fair and objective analysis of the public forum issue by raising the bogeyman of harassment and fraud.

These efforts, however, do not succeed. The Court should revisit the public forum doctrine, which has failed to keep pace with a rapidly evolving technological society, and which is sorely in need of modification or revision.

ARGUMENT

I. MIA IS A PUBLIC FORUM.

Petitioners do not seek access to the entire airport, or even to an entire terminal. Rather, petitioners' focus is limited to specific commercial terminal areas where travelers and non-travelers are encouraged to spend time.[1] Moreover, in accordance with the views expressed by Justice Kennedy in his concurring opinion in *Lee*, 505 U.S. at 709, petitioners are prepared to forego their right to solicit contributions, and confine their activities to the *sale* of literature.

This focus on sales in commercial areas fits perfectly with portions of MIA that are so closely akin to traditional public fora, that they must be considered as such. As respondents boast, MIA intends to communicate and reinforce the character of the City "through the design of a retail corridor which will have an 'urban street' 'pedestrian' feeling." (Miami Int'l Airport, *Retail Concessions Master Plan Executive Summary* at xi [hereinafter *Executive*

---

[1] The Court has observed that the relevant forum is defined by focusing on the "access sought by the speaker." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985). If a speaker seeks "general access" to an entire section of public property, then that property is the relevant forum. *Id.* However, if a speaker seeks more limited access, then the Court must tailor its approach to ascertain the "perimeters within the confines of government property." *Id.*; *see also Airline Pilots Ass'n, Int'l v. Department of Aviation*, 45 F.3d 1144, 1151 (7th Cir. 1995) (diorama display case within greater airport concourse held to be public forum).

Summary]).[2] These areas "have an open, airy, 'South Florida' or 'tropical' feeling, accentuated with architectural elements that reflect the diversity and vibrancy of the City." (*Id.*). "The entire retail area is intended to reflect the pace and energy of the City and create an interactive environment which promotes airport shopping as an adventure and is totally devoted to customer satisfaction." (*Id.*).

MIA, however, is not only a reflection of "the diversity and vibrancy of the City" which it serves (*id.*), but is literally a "shopping center with its own airport." (Bustamante Dep. at 19).[3] Retail concessions at MIA, accordingly, occupy 120 locations in the terminal building, and comprise about 200,000 square feet of space. (*Executive Summary* at xviii). These commercial amenities, moreover, are not merely ancillary to air travel.[4] At least 46% to 50% of all revenues generated at MIA are derived directly from its commercial operations, and the fees which the airlines pay to MIA for the space which they use is increased or decreased based upon the revenues generated by MIA from its retail operations. (Bustamante Dep. at 22).

---

[2] The *Retail Concessions Master Plan Executive Summary* is found in the record at R2-37.

[3] The deposition of Mayra Bustamante, Interim Assistant Aviation Director for Business Management, is found in the record at R2-36.

[4] "[T]he Airport's numerous commercial adjuncts indicate that [MIA] has intentionally devoted the facility to considerable commercial activity supportive of but essentially independent of the primary purpose." *Multimedia Publ'g Co. v. Greenville-Spartanburg Airport*, 991 F.2d 154, 163 (4th Cir. 1993).

That the sale of religious literature is consistent with the purpose, function and design of MIA is further corroborated by the retail sales facilities that operate from temporary structures in the middle of Concourse Level Two – areas that were formerly available for the solicitation of donations. (Davis Dep. at 80-82).[5] These commercial sales activities entail such amenities as coffee, cocktails, cellular phones, sports paraphernalia, sunglasses, and cosmetics. (*Id.*). And, like petitioners' fundraising activities, such commercial sales entail the request and receipt of money, and attract far larger crowds and lines than do petitioners' activities.

The amount of time that passengers spend in the terminal building, (an element that was not considered in *Lee*), is also a salient public forum factor. At MIA, 37% of the travellers have a dwell time of one to two hours; 28% have a dwell time of two to three hours; and 22% spend three hours or more in the airport. (*Executive Summary* at viii). This by far exceeds the amount of time that the average person spends in a shopping mall, which is little over an hour, *see* Barbara Shea, *Retailers Invade Airports*, Raleigh News & Observer, Nov. 24, 1996, at H7, *available in* 1996 WL 14234234, and it is common for many travellers to spend their "dwell time" in the commercial areas. *See, e.g., Airports: Orlando International*, Frequent Flyer, Feb. 1999, at 38, 38 ("A host of restaurants, stores and services gives the airport the mall-like feel providing travelers with countless preflight diversions.").

In order to ameliorate the harsh impact of *Lee*, respondents claim that section 25-2.2 is not a complete

---

[5] The deposition of Dickie K. Davis, Manager of Terminal Facilities, is found in the record at R2-26.

ban on petitioners' sales activities, but is rather a reasonable restriction on the "manner" in which funds may be received. (Resp. Br. at 6). That the restriction applies only to the immediate receipt of funds is of no consequence. Because petitioners must pay in advance for the religious books which they sell, a pre-addressed envelope for the purchaser to send in money at a later time is impractical, (Meis Decl. at 13, 37);[6] *see Lee*, 505 U.S. at 708 (Kennedy, J. concurring) ("Attempting to collect money at another time or place is far less plausible in the context of a sale than when soliciting donations"), and was actually tried unsuccessfully by the petitioners. (*See* Meis Dep. at 65-66).[7] Thus, regardless of how respondents seek to characterize section 25-2.2, it remains a direct and substantial restriction on protected expression.[8]

The evidence adduced below also confirms that the purported "problems" associated with petitioners' activities over the last 23 years are infinitesimal when measured against the total number of persons passing through MIA,[9] and should not, in any event, divert

---

[6] The deposition of Verne Meis is found in the record at R1-21.

[7] It is highly unlikely that any MIA merchant, including those conducting business in the solicitation areas formerly occupied by the petitioners, would agree to conduct business on a "deferred payment" basis such as that which has been imposed on petitioners.

[8] The First Amendment "was not designed to allow expression only when its effects are destined to be futile." *International Soc'y for Krishna Consciousness v. Griffin*, 437 F.Supp. 666, 672 (W.D. Pa. 1977).

[9] The district court calculated the number of complaints to be "approximately sixty-eight." App. 29. Petitioners, however, counted 79 complaints that were produced by the respondents

attention away from the factors relevant to public forum analysis. For example, the court in *International Society for Krishna Consciousness v. City of Los Angeles*, 966 F.Supp. 956 (C.D. Cal. 1997) was recently presented with evidence "that solicitation is basically incompatible with the purpose of LAX [Los Angeles International Airport]." *Id.* at 966. Like MIA, one group of grievances at LAX concerned annoyance and harassment. *Id.* The court held, however, that annoyance of airport patrons does support a complete ban on soliciting in the terminals. *Id.* "That people are annoyed or made uncomfortable by solicitors, or feel that solicitors reflect unfavorably on Los Angeles, is simply not a justification for banning the Plaintiffs' protected right to solicit and cannot be used by the Defendants to satisfy their burden of establishing that solicitation is basically incompatible with the purpose of the LAX." *Id.*

The court was also concerned about fraudulent solicitations and the exploitation of foreign tourists. The court noted, however, that "obtaining a donation via fraud is not protected speech. The City may pass and enforce laws against this type of behavior." *Id.* at 967. And, as to the purported exploitation of foreign tourists, the court suggested that the "problems could easily be dealt with short of banning all solicitation" by placing signs in passenger arrival areas in a familiar language "that inform them that they are under no obligation whatsoever to donate to solicitors." *Id.* The court concluded that, like here, " '[a]n occasional incident of misconduct cannot justify absolute

---

in the course of discovery. App. 29, n. 9. Moreover, between April, 1985, and December, 1994, MIA received an average of barely *nine* complaints per year. Since 1990, the number has fallen to *six-and-a-half* per year. This hardly constitutes a significant interference with MIA operations.

denial of access to ISKCON solicitors.' " *Id.* (quoting *Carreras v. City of Anaheim*, 768 F.2d 1039, 1046 (9th Cir. 1985)).[10]

II. AIRPORTS NATIONWIDE SHARE MIA'S PUBLIC FORUM FEATURES.

Respondents are mistaken that MIA in particular, and airports in general, have not made a quantum leap in their public forum attributes since *Lee* was decided. (Resp. Br. at 11-12). As a general matter, MIA, and the dozens of airports like it, are "a crossroad of destinations and cultures." Herbert Muschamp, *Concerned More About People Than Planes*, N.Y. Times, July 6, 1997, § 2, at 30. "Airports are . . . hubs in the international marketing of ideas, the public places that figure most largely in the imagination of those properly outfitted with laptops and cell phones, the leaders of a society driven by the exchange of information." Herbert Muschamp, *In Form and Function, It's a Tale of Two Terminals*, N.Y. Times, July 28, 1997, at A7 [hereinafter *Tale of Two Terminals*].

It has been further observed with respect to the nation's newest major airport – the Ronald Reagan Washington National Airport – that "[a]irports today are beyond air travel. They are not simply places for getting on and off planes. They are marketplaces where shops and restaurants outnumber the waiting areas for planes." *Tale of Two Terminals* at A7. Like MIA, it has also been

---

[10] Although *Carreras* and *City of Los Angeles* were decided under California law, the "compatibility" analysis which they employed is a factual determination that is highly useful and instructive of the standard to be applied to petitioners' activities at MIA.

noted with respect to Washington National, that it "is a department store half-heartedly disguised as a transportation terminal." *Id.* at A7.

Airports, accordingly, "offer consumers ways to spend their time there pleasantly or productively." Laurie McGinley, *Airports Try to Ease the Pain of Waiting With New Ways for Fliers to Spend Money*, Wall St. J., Aug. 21, 1990, at B1. "[W]ith airline delays increasing what is known as passenger 'dwell time' in terminals, it is in the financial self-interest of airports to serve up appealing distractions." *Id.*

Pittsburgh International Airport is the original model for airports nationwide. As a major hub for US Airways, it was one of the first airports to emphasize shopping. It gives merchants access to about 60,000 passengers a day and has about 100 retailers, including the Gap, Victoria's Secret, and Clinique. In 1997, Pittsburgh International had about $1,000 in sales per square foot, as compared to $291 in sales for the average mall. Jennifer Steinhauer, *It's a Mall . . . It's an Airport . . . It's Both: The Latest Trend in Terminals*, N.Y. Times, June 10, 1998, at C1, C1. Managers at Washington National report comparable results, where "annual sales average $950 a square foot, more than three times the business in an average mall store, where the figure tends to be closer to $250 to $300." *Id.*[11]

Thus, the image of travelers running frantically along terminal pedestrian routes to catch a plane or arrange for

---

[11] Washington National also features such national chains as The Disney Store, Victoria's Secret, and National Geographic, as well as those of local interest, such as the National Zoo and the Smithsonian Institution. *See* Harriet Baskas, *A Capital New Terminal*, (visited Jan. 5, 1999) <http://abcnews.go.com/sections/travel/Stuck/airport_washnational.html>.

ground transportation does not reflect reality. Instead, travelers and nontravelers alike spend a considerable portion of their time in the airport dining in upscale cafes and restaurants, perusing and purchasing consumer goods offered in the shops, stores, and boutiques, or simply sitting around. More than ever, therefore,

> the goal is to persuade the . . . traveler that he never leave the airport. He can fly in, rent a conference room provided by the airport, one of the airline clubs or an airport hotel, then fly out with the tang of jet fuel never quite forgotten. He might even decide to come to the airport and do business even though he's not travelling.

Richard Rayner, *Nowhere, U.S.A.*, N.Y. Times, Mar. 8, 1998, § 6 (Magazine), at 42, 46.

Any public forum decision reached by this Court with respect to MIA will thus apply equally to airports nationwide.

III. THE PUBLIC FORUM ANALYSIS APPLIED TO AIRPORT TERMINALS HAS LED TO SEVERE CONSEQUENCES IN OTHER FORA.

The severe consequences of *Lee* have been felt outside of the airport context. In *Chicago ACORN v. Metropolitan Pier & Exposition Authority*, 150 F.3d 695 (7th Cir. 1998), for example, the court of appeals relied on *Lee* in holding Navy Pier in Chicago to be a nonpublic forum. Although the Pier was a government-owned commercial and recreational complex adjacent to the downtown area, and consisted of indoor and outdoor pedestrian walkways, shops, restaurants, parks and gardens, amusement rides, and meeting and exhibition facilities, *id.* at 698, the court upheld a ban not only on soliciting, but on picketing,

marching, demonstrating, signature gathering, and making speeches in favor of raising the minimum wage, as well. *Id.* at 702.

Justice Kennedy's concern about the "vitality" of our public forum jurisprudence is thus clearly manifest in *Chicago ACORN*, which can only be resolved by modifying or revising *Lee*.

CONCLUSION

Respondents may not rely upon the abstract application of *Lee* in order to prevail. Unlike the airports at issue in *Lee*, the characteristics of MIA, as well as airports nationwide, are identical to the features of a traditional public forum, and should be recognized as such. Moreover, as discussed in petitioners' opening brief, section 25-2.2, which imposes a solicitation and sales ban throughout the entire airport, is substantially broader than the regulation upheld in *Lee*. The petition for certiorari should thus be granted.

Respectfully submitted,

DAVID M. LIBERMAN
Counsel of Record
DEBORAH ZEXTER
1888 Century Park East, Suite 1750
Los Angeles, California 90067
(310) 277-9288

HEYWARD A. BRADMAN
757 Northwest 27th Avenue
Third Floor
Miami, Florida 33125
(305) 643-3100

February 11, 1999